No. 97-317 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CARL T.C. GUTIERREZ, in his official capacity as Governor of Guam; the Director of the Department of Public Health & Social Services for the Territory of Guam; the Administrator of the Guam Memorial Hospital Authority; the Attorney General of the Territory of Guam; and the Members of the Guam Election Commission,

Petitioners,

—v.—

GUAM SOCIETY OF OBSTETRICIANS AND GYNECOLOGISTS; REVEREND MILTON H. COLE, JR.; LAURIE KONWITH; EDMUND A. GRILEY, M.D.; WILLIAM S. FREEMAN, M.D.; and JOHN DUNLOP, M.D.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition for certiorari filed by petitioners is untimely, and this Court therefore lacks jurisdiction, because it was filed more than ninety days after denial of a petition for rehearing by the court of appeals?

2. Whether the court of appeals properly affirmed a limited multiplier of an attorney's fees award, where the district court found that plaintiffs had difficulty obtaining counsel on Guam because of the undesirability of the case?

3. Whether the court of appeals properly affirmed a decision setting the hourly rates for a New York public interest law firm based on uncontested rate affidavits from private New York law firms?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION IS UNTIMELY 5

II. SHOULD THIS COURT ASSUME JURISDICTION OVER THE PETITION, IT SHOULD NEVERTHELESS BE DENIED. 8

A. The Affirmance By The Court Of Appeals Of An Enhancement Of AC&B's Lodestar Raises No Important Question That Should Be Decided By This Court. 9

B. The Affirmance By The Court Below Of A Fee Award For ACLU Attorneys Based On Rates Billed By Private New York Firms Is Entirely Consistent With This Court's Precedents 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page**

Ada v. Guam Soc'y of Obstetricians & Gynecologists, 505 U.S. 1011 (1992) 3

Blum v. Stenson, 465 U.S. 886 (1984)..... 9, 16

City of Burlington v. Dague, 505 U.S. 557 (1992).... 4, 9, 10

Cooper v. Pentecost, 77 F.3d 829 (5th Cir. 1996)..... 11

Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992)..... 4

Delta Airlines v. August, 450 U.S. 346 (1981)..... 15

Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980)..... 14

Doe v. Bolton, 410 U.S. 179 (1973)..... 2

Federal Election Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537 (1994)..... 6

Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 8

F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 7

F.T.C. v. Minneapolis-Honeywell R. Co., 344 U.S. 206 (1952) 7, 8

Gates v. Deukmejian,
987 F.2d 1392 (9th Cir. 1992) 4

Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992),
cert. denied, 505 U.S. 1053 (1993) 10

Guam Soc'y of Obstetricians & Gynecologists v. Ada,
776 F. Supp. 1422 (D. Guam 1990) 1-2, 2

Guam Soc'y of Obstetricians & Gynecologists v. Ada,
962 F.2d 1366 (9th Cir. 1991) 3

Hadix v. Johnson, 65 F.3d 532 (6th Cir. 1995) 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) 16

Huntington Branch, N.A.A.C.P. v. Huntington, N.Y.,
961 F.2d 1048 (2d Cir. 1992) 12-13, 13

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991),
cert. denied, 505 U.S. 1229 (1992) 12, 13

Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992) 10

Loranger v. Stierheim, 10 F.3d 776 (11th Cir. 1994) 10

Missouri v. Jenkins, 495 U.S. 33 (1990) 6

Morris v. American Nat'l Can Corp.,
941 F.2d 710 (8th Cir. 1991) 13

NLRB v. Hendricks County Rural Electric Corp.,
454 U.S. 170 (1981) 12

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 3

Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) 14

Roe v. Wade, 410 U.S. 113 (1973) 2, 3, 14

Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir.), *cert. denied*, 114 S. Ct. 548 (1993) 10

United States v. Johnson, 268 U.S. 220 (1925) 16

United States Department of Labor v. Triplett, 494 U.S. 715 (1990) 12

Walker v. United States Department of Housing and Urban Development, 99 F.3d 761 (5th Cir. 1996) 11

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 3

Youakim v. Miller, 425 U.S. 231 (1976) 15

Constitutional Provisions, Statutes & Rules

28 U.S.C. § 2101(c) 1, 5

42 U.S.C. § 1983 ..... 2, 3

42 U.S.C. § 1988 ..... 2, 3, 14

48 U.S.C. § 1421b(u) 2, 3

Guam Public Law 20-134 1

Sup. Ct. R. 10(a) 5

Sup. Ct. R. 10(c) 5

Sup. Ct. R. 13.1 5

Sup. Ct. R. 13.3 6

Sup. Ct. R. 13.5 5

Miscellaneous

ROBERT L. STERN et al.,
Supreme Court Practice (7th ed. 1993)..... 8

Respondents Guam Society of Obstetricians and Gynecologists, et al., respectfully submit the following brief in opposition to the petition for certiorari filed by Carl T.C. Gutierrez, in his official capacity as Governor of Guam, *et al.* [hereinafter "Guam"], docketed on August 21, 1997.

OPINIONS BELOW

In addition to the opinions below described in the Petition, the court of appeals denied Guam's petition for rehearing and suggestion for rehearing *en banc* by order dated April 16, 1997. That order is reproduced in the Appendix to this Brief at 1a-2a.[1] A second order entered by the court of appeals, and reproduced in the Appendix to the Petition at F-1-4, is reported at 113 F.3d 1089 (9th Cir. 1997).

JURISDICTION

This Court does not have jurisdiction over this case because the court of appeals denied Guam's petition for rehearing on April 16, 1997. The petition for certiorari was mailed on August 15, 1997, *see* letter to Clerk, 6a-7a, more than ninety days after rehearing was denied, and was docketed on August 21, 1997. Accordingly, the petition for certiorari is untimely under 28 U.S.C. § 2101(c), and this Court lacks jurisdiction. *See* Reasons for Denying the Writ, Point I.

COUNTERSTATEMENT OF THE CASE

On August 23, 1990, the United States District Court for the District of Guam permanently enjoined enforcement of Guam Public Law 20-134 ("the abortion ban"), which banned virtually all abortions in the territory. *Guam Soc'y of*

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[1] Citations to the Appendix to this Brief are given in the form "_a"; citations to the Petition are in the form "Pet. __"; and citations to the Appendix to the Petition are given by the page number in that appendix.

Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990). The district court held that the abortion ban violated a woman's fundamental right to choose abortion under *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), *see* 776 F. Supp. at 1428-29 & n.7; that portions of it were void for vagueness, *see id.* at 1428 n.7; and that the solicitation provisions in the law violated the right to freedom of speech, *see id.* at 1429 n.9.

The district court made two other landmark rulings. First, the court unequivocally rejected the Governor's[2] argument "that post-1968 United States Supreme Court decisions in the area of substantive due process right and equal protection have no force and effect in the Territory of Guam." 776 F. Supp. at 1427. In interpreting 48 U.S.C. § 1421b(u), which extends, *inter alia*, the second sentence of section 1 of the Fourteenth Amendment to Guam, the district court held that *Roe v. Wade* applies "with equal force and effect to the Territory of Guam." 776 F. Supp. at 1428. By its ruling on this issue, the district court guaranteed to residents of Guam a panoply of constitutional rights that the Governor of Guam argued they did not have.

Second, the district court held that 42 U.S.C. § 1983 "provides an independent ground to permanently enjoin" the defendants from enforcing the abortion ban. 776 F. Supp. at 1430. In doing so, the district court emphasized the importance of recovering attorney's fees under 42 U.S.C. § 1988: "Without such a provision, the sheer economic hardship placed upon practitioners who undertake such representation would effectively prohibit them from entering the fray." *Id.* at 1430 n.14. The district court's decision thus also established the critical principle that civil rights plaintiffs on Guam can avail themselves of the fee-shifting statute that exists for plaintiffs in the U.S. mainland.

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[2] The Governor was the sole defendant who defended the validity of the abortion ban in the district court.

The district court's decision was unanimously affirmed by the United States Court of Appeals for the Ninth Circuit. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1991). The court of appeals held that 48 U.S.C. § 1421b(u) "expressly extends to Guam the Due Process Clause of the Fourteenth Amendment, upon which the holding of *Roe* was founded," *id.* at 1369 (footnote omitted), and that 42 U.S.C. § 1983 applies to Guam officials sued in their official capacity for injunctive relief. *Id.* at 1371.

The court of appeals also rejected the Governor's efforts to show that *Roe* had no force after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See* 962 F.2d at 1372-73; *see also id.* at 1372 n.6. Within a week after the court of appeals' decision, this Court heard oral arguments in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The court of appeals opinion was supplied to this Court in a Supplemental Brief by the Petitioners in *Casey*. Despite *Casey*'s clear majority holding re-affirming "*Roe*'s essential holding," 505 U.S. at 840, and less than a month after *Casey* was decided, the Governor of Guam petitioned this Court for certiorari, essentially asking the Court to overrule its decision in *Casey*. This Court denied certiorari. *See* 505 U.S. 1011 (1992).

While the appeal on the merits of the case was pending before the court of appeals, the district court considered plaintiffs' application for attorney's fees and costs under 42 U.S.C. § 1988. In the first attorney's fees proceeding, the district court awarded plaintiffs fees and costs for merits work and the preparation of the fee application, and awarded a multiplier of 2.0 for the merits work of the Guam firm of Arriola, Cowan & Bordallo (AC&B), A-19, but did not enhance the fee award made to the New York-based American Civil Liberties Union Reproductive Freedom Project (ACLU-RFP), the two firms that represented the plaintiffs. A-16.

The district court's first-round fee award was appealed by Guam to the court of appeals. The court of appeals "remand[ed] the case for the district court to reconsider its fee award in light of" *City of Burlington v. Dague*, 505 U.S. 557 (1992), *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992), and *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). B-3. On remand, the district court declined to alter the original award, C-6, justifying its decision not to reduce the multiplier as follows:

> While the risk of the contingent fee did factor into the court's first decision, the more important considerations, as reflected in the decision, were the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam.

Id. The district court thus reinstated its first award.

Guam again appealed. In affirming the application of a multiplier, the court of appeals held: "Based upon the record in this case, the district court was not clearly wrong in its conclusion that plaintiffs were unlikely to find other local counsel." E-12. Specifically, the court below found that there was no reason to disbelieve evidence showing "that plaintiffs would have found it 'extremely difficult, if not impossible' to obtain experienced local counsel." E-15. The court of appeals also rejected Guam's argument that the district court "abused its discretion in relying on the affidavits establishing rates for private New York attorneys." E-22. Accordingly, the court below affirmed the district court's second-round award of fees with an adjustment to the interest allowed by the district court. E-26.

Guam filed a petition for rehearing with suggestion for rehearing *en banc*. The court of appeals denied the petition for rehearing by Order dated April 16, 1997. That Order was designated "Not for Publication." On May 19, 1997, the

court of appeals withdrew its earlier order and substituted the identical order, this time designated "For Publication." On August 15, 1997, one hundred and twenty-one (121) days after the petition for rehearing was denied, Guam mailed its petition for certiorari to this Court. The petition was docketed on August 21, 1997.

REASONS FOR DENYING THE WRIT

The petition for certiorari is untimely; thus, certiorari should be denied because the Court lacks jurisdiction. Even if this Court nonetheless assumes jurisdiction over this case, the petition should be denied because Guam has failed to establish any of the factors that weigh in favor of a grant of certiorari. The decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION IS UNTIMELY.

Under 28 U.S.C. § 2101(c), "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree."[3] *See also* Sup. Ct. R. 13.1 ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered

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[3] The only exception to the ninety-day time limit is where "[a] justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." *Id.* *See also* Sup. Ct. R. 13.5 (same). Guam neither sought nor obtained such an extension from a Justice of this Court.

by . . . a United States court of appeals . . . is timely filed when it is filed with the Clerk of this Court within 90 days after entry of the judgment"). It is well settled that the ninety-day limit for filing a petition for certiorari is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994) (same). The petition for certiorari was not filed within the ninety-day limit, and this Court therefore has no jurisdiction in this case.

The court of appeals affirmed the district court's award of attorney's fees by decision dated November 7, 1996. *See* E-1. Guam filed a timely petition for rehearing with suggestion for rehearing *en banc*. On April 16, 1997, the court of appeals entered the following order: "The petition for rehearing is denied and the suggestion for rehearing en banc rejected." 1a-2a. The order was designated "NOT FOR PUBLICATION" by the court of appeals.

Thus, the time in which to file a petition for certiorari in this matter ran from April 16, 1997, when the court of appeals denied Guam's petition for rehearing. Rule 13.3 of this Court's rules provides:

> [I]f a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) *runs from the date of the denial of the petition for rehearing* or, if the petition for rehearing is granted, the subsequent entry of judgment.

Sup. Ct. R. 13.3 (emphasis added). *See also Jenkins*, 495 U.S. at 45-46. Guam's time to file a petition for certiorari expired on July 15, 1997 (a Tuesday), ninety days after "the date of the denial of the petition for rehearing."

On May 19, 1997, the court of appeals entered a second order. That order stated: "The Order filed on April 16, 1997 is withdrawn. The panel will redesignate that same Order as being 'FOR PUBLICATION' and will file it." F-1. Because the May 19, 1997 Order is, aside from this statement, *identical* to the April 16, 1997 Order denying the petition for rehearing, it did not extend Guam's time to file its petition for certiorari beyond July 15, 1997.

In *F.T.C. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952), this Court assessed the timeliness of a petition for certiorari in a case in which the court of appeals had entered two "judgments," one dated July 5, 1951, called a "judgment," and a second issued on September 18, 1951, labeled a "Final Decree." *See id.*, 344 U.S. at 212. There, the two "judgments" differed slightly, *see id.* at 209-10; here the two "judgments" in question are identical, except for the language quoted above in the second judgment *stating*, in essence, that the second order is the same as the first. This Court decided, in a holding directly applicable to this case, that:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Id. at 211-12. *Cf. F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965) (second opinion of court of appeals

"resolved a genuine ambiguity," hence "time within which certiorari had to be requested dates from the second judgment").

Here, the May 19 Order by the court of appeals not only changed no "matters of substance," it actually changed *nothing* in the prior order, except to redesignate it "for publication." No legal rights or obligations were "disturbed or revised" by the May 19 Order. Thus, under *Minneapolis-Honeywell*, the "period within which . . .[the] petition for certiorari [must be] filed" did *not* run anew from the May 19 Order, but from the original April 16, 1997 Order. *See also Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("If the court did no more by the second judgment than to restate what it had decided by the first one, . . . the 90 days would start to run from the first judgment."). Since the petition was filed beyond the statutory time limit of July 15, 1997, without any extension of time granted by a Justice of this Court, this Court lacks jurisdiction to consider it. *See generally* ROBERT L. STERN et al., *Supreme Court Practice* at 278 (7th ed. 1993) ("This jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained.").

II. SHOULD THIS COURT ASSUME JURISDICTION OVER THE PETITION, IT SHOULD NEVERTHELESS BE DENIED.

Even assuming, *arguendo*, that this Court has jurisdiction, the Court should deny the petition for certiorari. The petition raises four questions, three of which relate to the affirmance of a 2.0 multiplier of the fee award to AC & B. The fourth question addresses the hourly rates set by the district court for the ACLU attorneys and affirmed by the court of appeals. Guam's arguments on these questions raise no important federal questions that should be settled by this

Court, and consideration of them by this Court should therefore be rejected.

A. The Affirmance By The Court Of Appeals Of An Enhancement Of AC&B's Lodestar Raises No Important Question That Should Be Decided By This Court.

Guam argues that three grounds favor review by this Court of the multiplier affirmed by the court below. First, the multiplier was awarded for factors "subsumed in the loadstar [sic]." Pet. at 8. Second, the evidence of actual difficulties in finding counsel was insufficient to justify the award, and the evidentiary standard applied by the court below differs from that employed by other courts of appeals. Pet. at 12. Third, approval of the multiplier results in an award that is "unreasonable and punitive in nature." Pet. at 18. None of these arguments present significant issues of national import that merit this Court's review.

1. The Court of Appeals' Opinion Does Not Conflict With This Court's Precedents or Other Circuit Decisions.

Contrary to Guam's argument, the court of appeals did *not* ignore this Court's holding in *Dague* that contingency may not be used as a basis for enhancing the lodestar. The court of appeals, instead, properly held that difficulty in obtaining counsel -- the primary basis for the district court's enhancement of the AC&B lodestar -- is not subsumed within contingency. *See* E-9-10.

This holding is consistent with this Court's precedents that an upward adjustment of the lodestar must be necessary to arrive at a reasonable award. *Dague*, 505 U.S. at 562; *Blum v. Stenson*, 465 U.S. 886, 898 (1984). This Court's decision in *Dague* simply eliminated "contingency" as a factor which could be used to justify an upward adjustment. But while contingency relates to the risk of nonpayment,

difficulty in obtaining counsel is independent of the merits of a case. In this case, the district court made findings of fact that fully support the conclusion that plaintiffs could not have obtained other Guam counsel. *See* E-13 (quoting district court findings regarding unanimity of vote for law in Guam Legislature, Governor's personal support of law, threats of excommunication of opponents of law, and death threats received by Ms. Arriola); *id.* at n.7 (detailing death threats and Guam police response). Nothing in this Court's decisions conflicts with enhancement of an attorney's fee award based on such facts.

Nor does the decision of the court below conflict with decisions of other United States courts of appeals. Rather, those courts have recognized that *Dague* still permits upward adjustments to the lodestar for non-contingency factors. For example, in *Grant v. Martinez*, 973 F.2d 96 (2d Cir. 1992), *cert. denied*, 505 U.S. 1053 (1993), the court wrote, "[a]lthough there is a strong presumption that the lodestar figure represents the reasonable fee, other considerations may lead to an upward or downward departure from the lodestar." *Id.*, 973 F.2d at 101 (internal quotations and citations omitted). Similarly, the Fifth Circuit in *Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir.), *cert. denied*, 114 S. Ct. 548 (1993), concluded that enhancement based upon the results obtained may have been warranted, and remanded the case to the district court for recalculation, *id.* at 323, while specifically holding that *Dague* ruled out contingency-based enhancements. *Id.* The First Circuit has also recognized an exception allowing enhancements after *Dague* for "exceptional performance/results." *Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992) ("there exists a strong presumption, not an outright ban" against such enhancements). *See also Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994) (recognizing category of "rare and exceptional case[s] where an upward adjustment of the lodestar is called for because of exceptional success");

Cooper v. Pentecost, 77 F.3d 829, 833 (5th Cir. 1996) (recognizing that "in certain exceptional cases" it is appropriate to "enhance the lodestar").

Indeed, the only case cited by Guam as representing a "direct conflict" with the decision of the court below presents no conflict at all. In *Walker v. United States Department of Housing and Urban Development*, 99 F.3d 761 (5th Cir. 1996), the court discussed "the 'undesirability' of the case," *id.* at 771, the factor relied upon by the court below, without indicating that it could not form the basis for an enhancement of the lodestar. Rather, the court held that the district court's findings of undesirability were based on "earlier litigation in [the] case," rather than the undesirability of present work for which an enhancement was at issue.[4] Because the *Walker* court noted that the lower court failed to make appropriate findings on this issue, it actually *supports* the proper use of undesirability as a basis for upward adjustment of the lodestar. Thus, Guam has pointed to no conflict between the decision of the court below and the decisions of other courts of appeals or this Court.

2. The Court of Appeals' Assessment Of The Evidence Supporting A Finding Of Undesirability Does Not Merit This Court's Review.

Guam next contends that, even if undesirability and difficulty in obtaining Guam counsel could justify an upward adjustment of the lodestar, there was insufficient evidence justifying these findings. This is not a basis for seeking certiorari, because this Court will generally not review

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[4] *Walker* correctly recognizes that this Court has "barred" use of "the contingent nature of the fee" in adjusting the lodestar. 99 F.3d at 772. But it also recognizes that other factors are not barred by this Court, though the use of some has been "limited greatly" by this Court. *Id.* at 771. Not only has undesirability as a factor not been barred by this Court according to *Walker*, it is not even among the factors "limited greatly."

questions of fact. *See, e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (finding that grant of certiorari was "improvident" because "we are presented primarily with a question of fact, which does not merit Court review").

That difficulty in obtaining counsel *was* a question of fact is made very clear by the opinion of the court below. The court cited one affidavit stating that the position of the Catholic church on abortion and the class action nature of the lawsuit would have made it difficult for plaintiffs to find experienced Guam counsel, *see* E-11; another affidavit simply stated that plaintiffs would not have had difficulty obtaining Guam counsel because "the plaintiffs in a Guam asbestos class action suit had no difficulty obtaining local counsel." E-12. The court of appeals properly concluded that the district court did not clearly err in choosing to believe one affidavit rather than the other, especially because the basis for the first opinion seemed more relevant. *Id.* This weighing of the evidence and its probity are not appropriate for review by this Court.

Guam suggests further that the analysis used by the court of appeals' assessment of the evidence conflicts with this Court's decision in *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990). But *Triplett* is completely inapposite. It did not reject the use of "anecdotal evidence" in *attorney's fees litigation*. Instead, it rejected the use of anecdotal evidence about unavailability of attorneys where that evidence was used to invalidate a program established by Congress. *Id.* at 723. Moreover, *Triplett* did not involve award of a multiplier, and it simply has no bearing on the decision of the court below.

Guam also claims that a conflict exists between the decision of the court below and the decisions in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992), and *Huntington Branch, N.A.A.C.P. v.*

Huntington, N.Y., 961 F.2d 1048 (2d Cir. 1992). In *King*, the court required a showing of "actual difficulties" in obtaining counsel in the context of "contingency enhancements." 950 F.2d at 778. But the court below found that there was sufficient evidence of difficulty in obtaining counsel to support an enhancement *apart* from contingency. Moreover, even *King* recognized that other Circuits take different approaches to the evidence required to support a finding of difficulty in obtaining counsel. *Id.* (citing *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991), as case "stating that no actual difficulties need be shown").

Huntington is likewise not in conflict with the decision of the court below. There the court held that fee enhancement is not necessary when plaintiffs are represented by an organization whose purpose is to provide legal help to the indigent. *Id.* at 1050-51. AC&B, a private, commercial Guam firm, is not an organization dedicated to serving the indigent. Thus, *Huntington*, by its own terms, is distinguishable from this case. Moreover, as in *King*, the discussion in *Huntington* is entirely in the context of difficulty in obtaining counsel because of "the risk of nonpayment," 961 F.2d at 1050, i.e., contingency. Thus, *Huntington*, like *King*, does not purport to apply to difficulty in obtaining counsel because of the controversial and volatile nature of the case.

Because Guam has failed to identify any direct conflict on any important matter between the decision of the court below and the decision of another court of appeals or this Court, and because Guam presents only matters of evidence, review by this Court is not warranted.

3. The Decision Of The Court Below Is Not Punitive Or Exorbitant.

Lastly, Guam argues that the fee award as affirmed by the court of appeals is "exorbitant" and that the court below

therefore improperly "punished" Guam. *See* Pet. at 19. This argument quite simply states no ground upon which this Court should grant certiorari.

It is well-settled that the purpose of 42 U.S.C. § 1988 is, at least in part, to "encourage compliance with and enforcement of the civil rights laws." *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (footnote omitted). Indeed, "assessing fees against defendants . . . may deter wrongdoing in the first place." *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Because the fee award in this case is reasonable and serves the function of encouraging Guam to comply with the Constitution, it is entirely consistent with the purpose of 42 U.S.C. § 1988.

Furthermore, this case established, over Guam's strenuous opposition, the broad principle that all of Guam's residents are protected by the Due Process Clause of the Fourteenth Amendment, including *Roe v. Wade*. It also established, through the applicability of § 1988, effective access to the judicial process for civil rights grievances. These results benefit Guam taxpayers, and if Guam must pay what has been determined to be a reasonable attorney's fee for resisting these results, that consequence is not punitive, it is entirely appropriate.

B. The Affirmance By The Court Below Of A Fee Award For ACLU Attorneys Based On Rates Billed By Private New York Firms Is Entirely Consistent With This Court's Precedents.

The argument that New York hourly rates for the ACLU attorneys should not apply was waived by Guam long ago in this litigation. The court of appeals never addressed the propriety of New York hourly rates for the ACLU attorneys, because the district court's ruling on this issue was never

appealed to the court of appeals, even in the first-round fee appeal.[5]

As the court of appeals wrote, Guam "do[es] not contend that New York is not the relevant community for determining the prevailing market rate [for the ACLU attorneys]." E-21. Because Guam did not raise this matter in the court below, it is barred from urging it now in this Court. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised . . . in the lower court.").

Even if Guam is permitted to revive an argument it waived below, the issues relating to the ACLU attorneys' hourly rates do not merit this Court's review. There is not, as Guam contends, a "direct conflict," *see* Pet. at 20, between the decision of the court below and *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995). *Hadix* rejected a fee award at higher "out-of-town" hourly rates, finding that petitioners failed to show that "it was necessary to resort to an out-of-town specialist." *Id.* at 535. In this case, the district court found that the ACLU attorneys "have unique experience and skill in [abortion rights] cases, and can marshal resources not available on Guam." A-12. Further, *Hadix* involved an out-of-town specialist brought in to monitor a consent decree, and the court found that "her expertise was [not] necessary in this phase of the . . . litigation." 65 F.3d at 535. The *Hadix* opinion does not conflict with the opinion of the court below.

Guam next argues that, even if New York hourly rates apply, this Court should review the decision of the court below because the ACLU "did not submit any evidence" of what it "normally charges in cases such as this one." Pet. 22.

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[5] While it is true that Guam *initially* "opposed the rates requested by ACLU," Pet. at 22, it never pursued its opposition after the district court's first attorney's fees ruling of June 25, 1991.

This argument is meritless. *Blum v. Stenson*, 465 U.S. 886 (1984), held that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Id.* at 895 (footnote omitted). Because of "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters," an award of attorney's fees under § 1988 is entitled to substantial deference. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Guam's claim that the district court made a factual error in determining the prevailing market rate, and that the court of appeals created an "important federal question" in affirming that error, simply does not warrant this Court's attention. As this Court has long held, "We do not grant a certiorari petition to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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